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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

GARVEY SCHOOL DISTRICT,

Plaintiff and Respondent,

v.

ROBERT MIRANDA,

Defendant;

JOSE M. CASTILLO,

Objector and Appellant.

B189820

(Los Angeles County  
Super. Ct. No. GC035560)

APPEAL from an order of the Superior Court of Los Angeles County,  
Jan A. Pluim, Judge. Reversed with directions.

Jose Mariano Castillo, in pro. per, for Objector and Appellant.

Garcia Calderon Ruiz, James R. Lynch and Chaka C. Okadigbo for Plaintiff and  
Respondent.

Jose Mariano Castillo (Castillo), former attorney for defendant Robert Miranda (Miranda), appeals in propria persona an order directing Castillo to pay sanctions in the amount of \$10,922.50 to plaintiff and respondent Garvey School District (the District) for filing a frivolous anti-SLAPP motion on Miranda's behalf. (Code Civ. Proc., § 425.16.)<sup>1 2</sup>

The essential issue presented is whether the trial court abused its discretion in sanctioning Castillo.

The record reflects Castillo, without authorization, signed Miranda's name to the moving declaration on the anti-SLAPP motion. Therefore, the Miranda declaration, which was the sole declaration filed in support of the anti-SLAPP motion, must be disregarded. Nonetheless, contrary to the trial court's ruling, the negation of the moving declaration did not render the anti-SLAPP motion frivolous.

In opposing Miranda's anti-SLAPP motion below, the District conceded "Miranda's comments . . . arose from acts in furtherance of his rights of free speech and petition." Thus, it was undisputed the moving papers on the anti-SLAPP motion met their burden to show the challenged causes of action arose from protected activity. Because Miranda met his burden as a moving defendant, the burden shifted to the District to show a reasonable probability it would prevail on its claims against Miranda.

Thus, the record establishes that irrespective of the unauthorized moving declaration, the moving papers met their burden. Therefore, the anti-SLAPP motion was not frivolous. Accordingly, the order sanctioning Castillo for filing the anti-SLAPP motion must be reversed with directions.

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<sup>1</sup> All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

<sup>2</sup> An "order directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars (\$5,000)" is appealable. (§ 904.1, subd. (a)(12).)

## FACTUAL AND PROCEDURAL BACKGROUND<sup>3</sup>

### 1. *Pleadings.*

On June 29, 2005, the District as well as Lisa A. and Jaime A., guardians ad litem for Giovanni A., and Giovanni A., filed suit against Miranda and Rachel Cervera (Cervera), Giovanni's kindergarten teacher. The complaint alleged, inter alia, causes of action for invasion of privacy, libel and slander, and violation of the right of six-year old Giovanni to receive a free public education without discrimination. The action arose out of Miranda's efforts to have Giovanni removed from his school in the District because of his medical condition, eczema. Miranda allegedly circulated false statements to parents of Giovanni's classmates about Giovanni, claiming that Giovanni literally dripped blood during the school day and that he left blood on everything he touched.<sup>4</sup>

On or about August 4, 2005, Miranda, represented by Castillo, filed an answer to the complaint as well as a cross-complaint. The cross-complaint was directed at the individual plaintiffs, including Giovanni, three of the District's employees and two of the plaintiffs' attorneys, and alleged, inter alia, causes of action for abuse of process, slander, libel and intentional infliction of emotional distress.

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<sup>3</sup> It is rudimentary that Castillo, as the appellant, has the burden affirmatively to show error by furnishing an adequate record for review. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 518, p. 562.) The appellant's appendix, although it exceeds 700 pages, is woefully deficient in that it commences with the District's notice of motion for monetary sanctions. We glean the factual and procedural history from the limited record before this court.

The inadequate record is not the only procedural failing on appeal. Castillo's opening brief fails to support references to matters in the record with citations to the record. (Cal. Rules of Court, former rule 14(a), continued in rule 8.204(a), eff. Jan. 1, 2007.) Instead, Castillo's brief reads like a first person narrative, purporting to describe his intentions and motivations underlying his representation of Miranda. (See, e.g. appellant's opening brief, p. 4 "I was hesitant to undertake the representation of Miranda . . . . Now, I wish I would have gone with my first instinct.")

All further rule references are to the California Rules of Court.

<sup>4</sup> Miranda allegedly acted as the director of the Los Angeles Metro Region of the Mexican-American Political Association to represent concerned parents of Giovanni's classmates.

*2. Miranda's unsuccessful anti-SLAPP motion to strike the complaint.*

On or about August 15, 2005, Castillo filed a special motion to strike all causes of action against Miranda (the “anti-SLAPP” motion).<sup>5</sup> Said motion was supported by a single declaration by Miranda. The motion asserted the complaint against Miranda was a SLAPP suit and arose out of acts taken by Miranda in furtherance of his rights of free speech or petition in connection with the redress of some grievance on a public issue, and that plaintiffs could not prevail on their complaint against Miranda.

Plaintiffs filed opposition papers and supporting declarations. Plaintiffs conceded Miranda's comments arose from acts in furtherance of his rights of free speech and petition. Therefore, plaintiffs' papers focused on the merits of the action; they contended there was a reasonable probability plaintiffs would prevail on their claims against Miranda, requiring denial of his anti-SLAPP motion.

Miranda filed reply papers, supported by the declarations of Miranda, Cervera and others.

On October 12, 2005, the trial court denied the anti-SLAPP motion.

*3. Discovery reveals Castillo lacked authority to sign Miranda's name to the declaration in support of the anti-SLAPP motion.*

On November 14, 2005, one month after the denial of Miranda's anti-SLAPP motion, counsel for the District took Miranda's deposition. The deposition transcript provides in relevant part:

“Q Do you – do you remember signing a declaration in support of [the anti-SLAPP] motion?

“A No.

“Q. Okay. [¶] So do you have any idea who signed this declaration?

“A. Nope.

“Q. Did you authorize anyone to sign a declaration on your behalf?

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<sup>5</sup> The appellant's appendix contains the anti-SLAPP motion as “Exhibit C” to Castillo's opposition papers on the sanctions motion.

“A. No.<sup>6</sup>

4. *The District’s motion for sanctions pursuant to section 425.16, for Castillo’s filing a frivolous and dilatory anti-SLAPP motion.*<sup>7</sup>

On December 13, 2005, the District filed a motion for attorney fees and monetary sanctions against Castillo on various grounds, including “[k]nowingly submitting a forged signature on the lone declaration accompanying the anti-SLAPP motion as part of a design to hinder discovery and delay prosecution of the instant case, giving rise to the District’s entitlement to recover its attorney fees . . .” In support, the District’s motion cited, inter alia, Miranda’s deposition transcript, wherein Miranda disavowed the declaration which Castillo purportedly submitted on his behalf.

In opposition, Castillo asserted the declaration of Miranda, filed in support of the anti-SLAPP motion, was prepared with Miranda’s participation and was signed by Castillo “under the authority given to him by Robert Miranda, who could not sign the declaration himself as he was in a hospital in Loma Linda.” Castillo’s opposing declaration stated: “There was, absolutely, no reason for me to have signed a declaration without authority. This declaration [i.e., the Miranda declaration in support of the anti-SLAPP motion] is the declaration of Miranda.”

5. *The hearing on the motion for sanctions.*

On January 11, 2006, the matter came on for hearing. The following colloquy occurred between the trial court and Castillo:

“The Court: I guess we have some problem in your office . . . about the signed declaration of Mr. Miranda?

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<sup>6</sup> Miranda soon discharged Castillo.

<sup>7</sup> Section 425.16 states in relevant part at subdivision (c): “If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney’s fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.”

“Mr. Castillo: Yes, Your Honor. I might explain that in my moving papers.

“The Court: I’m not so certain I really fully understand who signed what, but it certainly wasn’t Mr. Miranda.

“Mr. Castillo: No. It is stated in my . . . papers. . . . I give a detailed explanation as to what happened.

“[¶] . . . [¶]

“The Court: But who did the signing? Who signed it?

“Mr. Castillo: I did. I did.

“The Court: You signed it?

“Mr. Castillo: I did. And I say so here.

“The Court: Why would you sign somebody’s name?

“Mr. Castillo: Well, ‘cause I had his authority to sign his name.

“The Court: You had written authority?

“Mr. Castillo: No, oral authority, Your Honor. My client was in the hospital.

“The Court: But I mean, when his deposition was taken, he totally disputed all that. [¶] . . . [¶] . . . [I]t just doesn’t happen where an attorney signs somebody’s name under penalty of perjury.

“Mr. Castillo: Because I have his authority . . .

“The Court: He gave you what? Power of attorney on it or what?

“Mr. Castillo: No, . . . [¶] . . . [¶] The information, Your Honor, for all these declarations, came from him. . . .

“The Court: Oh, I know you claim it did, and he disputes that.

“Mr. Castillo: I . . . am bound by the attorney—client privilege. I cannot force him to give it to me. On a certain date, he gave me the authority.

“The Court: You know, I think the State Bar . . .

“Mr. Castillo: I even have his waiver.

“The Court: [The State Bar] would be a little unhappy about attorneys signing a client’s name to a declaration.

“Mr. Castillo: If he did it without authority –

“The Court: If you had, maybe, a power of attorney on it.

“Mr. Castillo: If you did it without authority, I agree with you, Your Honor. But right here I have the authority. He gave me the information. He was –

“The Court: He disputes that, though.

“Mr. Castillo: I know. *But in an evidentiary hearing, you know, he would – I will attempt to prove that, Your Honor, he did give me the authority.* This is something I didn’t do on my own, Your Honor. There was no reason for me to do that. I’ve never done that.

“The Court: But the fact is he didn’t sign it. . . . [¶] . . . [¶] The declaration should have been stricken, and therefore, we don’t have . . . much of a motion to strike.

“Mr. Castillo: Okay. Your Honor, in the findings of the court . . . at the time that the [anti-SLAPP] motion was heard on October 12, the court made no finding . . . that [the] motion was frivolous. . . .

“The Court: But I’m making that finding now.” (Italics added.)

#### 6. *Trial court’s ruling.*

After taking the matter under submission, the trial court issued an order on January 23, 2006, finding the special motion to strike filed by Castillo was “frivolous and solely intended to cause unnecessary delay. A Special Motion to Strike must be supported by declarations stating facts upon which the liability or defense is based. CCP 425.16(b). It is undisputed that in this case the Special Motion to Strike was supported by a declaration purportedly executed by defendant Robert Miranda but, in fact, signed by attorney Castillo or one of Castillo’s agents. As there was no competent evidence in support of the Special Motion to Strike, it was rendered a frivolous motion and should not have been filed. [¶] Attorney Castillo is ordered to pay CCP 128.5 sanctions in the amount of \$10,922.50 to the District.”

On March 14, 2006, Castillo filed a timely notice of appeal from the order.

## CONTENTIONS

Castillo contends: the trial court erred in finding the special motion to strike he filed on behalf of Miranda was frivolous and solely intended to cause delay; the trial court erred in denying his request for an evidentiary hearing which would have given him the opportunity to call Miranda as an adverse witness and establish that the declaration was signed by Castillo under Miranda's express authority.<sup>8</sup>

## DISCUSSION

### 1. *General principles and standard of review.*

With respect to attorney fees, section 425.16 provides in relevant part at subdivision (c): "If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court *shall* award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5." (Italics added.) Thus, the imposition of sanctions for a frivolous anti-SLAPP motion is mandatory. (*Moore v. Shaw* (2004) 116 Cal.App.4th 182, 198-199.)

The reference to section 128.5 in section 425.16, subdivision (c) means a court must use the procedures and apply the substantive standards of section 128.5 in deciding whether to award attorney fees under the anti-SLAPP statute. (*Decker v. U.D. Registry, Inc.* (2003) 105 Cal.App.4th 1382, 1392 (*Decker*); *Moore v. Shaw, supra*, 116 Cal.App.4th at p. 199.)<sup>9</sup> A determination of frivolousness requires a finding the anti-SLAPP "motion is 'totally and completely without merit' (§ 128.5, subd. (b)(2)), that is,

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<sup>8</sup> Castillo's appeal takes issue with the imposition of sanctions, not with the *amount* of the award.

<sup>9</sup> Irrespective of the statement in section 128.5 that it applies only to actions or tactics arising "from a complaint filed, or a proceeding initiated, on or before December 31, 1994" (§ 128.5, subd. (b)(1)), the procedures and standards of section 128.5 remain operative to guide the implementation of the attorney fee provision of section 425.16, subdivision (c). (*Decker, supra*, 105 Cal.App.4th at p. 1392; *Moore v. Shaw, supra*, 116 Cal.App.4th at p. 199, fn. 9.)



‘any reasonable attorney would agree such motion is totally devoid of merit.’  
[Citation.]” (*Decker, supra*, at p. 1392, italics added.)

Although the merits of the trial court’s ruling on an anti-SLAPP motion (i.e., whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity and if so, whether the plaintiff has demonstrated a probability of prevailing on the claim) are reviewed de novo (*Moore v. Shaw, supra*, 116 Cal.App.4th at pp. 193-194), we review the trial court’s determination with respect to sanctions for an abuse of discretion. (*Id.* at p. 199; *Decker, supra*, 105 Cal.App.4th at p. 1391.)

2. *Castillo’s failure to seek permission to present oral testimony in advance of the sanctions hearing precludes him from contending he should have been allowed to call Miranda as an adverse witness.*

Former rule 323, pertaining to oral testimony at a law and motion hearing, provided in relevant part: “(a) Evidence received at a law and motion hearing must be by declaration, affidavit, or request for judicial notice without testimony or cross-examination, except as allowed in the court’s discretion for good cause shown. [¶] (b) *A party seeking permission to introduce oral evidence, except for oral evidence in rebuttal to oral evidence presented by the other party, must file, no later than three court days before the hearing, a written statement stating the nature and extent of the evidence proposed to be introduced and a reasonable time estimate for the hearing.* When the statement is filed less than five court days before the hearing, the filing party must serve a copy on the other parties in a manner to assure delivery to the other parties no later than two days before the hearing.” (Italics added.)<sup>10</sup>

Here, in view of Castillo’s failure to proceed in accordance with the procedural requirements of former rule 323, the trial court properly refused his belated request during the sanctions hearing to call Miranda as an adverse witness.

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<sup>10</sup> The substance of former rule 323 is continued in rule 3.1306, effective January 1, 2007.

3. *Irrespective of the unauthorized moving declaration, the anti-SLAPP motion was not frivolous because the moving papers met their burden of showing the challenged causes of action arose from protected activity; therefore, the trial court abused its discretion in sanctioning Castillo for bringing the anti-SLAPP motion.*

a. *We defer to trial court's credibility determination that Castillo lacked authorization from Miranda to sign the moving declaration on the anti-SLAPP motion; however, the negation of the moving declaration is insufficient to render the anti-SLAPP motion frivolous.*

The applicable standards of appellate review of a judgment based on affidavits or declarations are the same as for a judgment following oral testimony: We must accept the trial court's resolution of disputed facts when supported by substantial evidence; we must presume the court found every fact and drew every permissible inference necessary to support its judgment, and defer to its determination of credibility of the witnesses and the weight of the evidence. (*Griffith Co. v. San Diego Col. for Women* (1955) 45 Cal.2d 501, 508; *Betz v. Pankow* (1993) 16 Cal.App.4th 919, 923.)

Here, in ruling on the motion for sanctions, the trial court rejected Castillo's assertion in his opposing declaration that he was duly authorized by Miranda to sign the declaration on his behalf. We defer to the trial court's determination concerning Castillo's credibility. (*Betz v. Pankow, supra*, 16 Cal.App.4th at p. 923.) Therefore, we uphold the trial court's finding that Castillo signed the moving declaration without authorization from Miranda.

Nonetheless, the issue remains as to the effect of the unauthorized declaration on the viability of the anti-SLAPP motion.

b. *Trial court erred in concluding the unauthorized moving declaration rendered the anti-SLAPP motion frivolous.*

In granting the District's motion for sanctions, the trial court ruled that because Miranda's moving declaration was unauthorized and had to be disregarded, "there was no competent evidence in support of the Special Motion to Strike" and therefore, the special motion to strike was "a frivolous motion and should not have been filed."

The trial court's analysis overlooked the respective burdens of the parties on an anti-SLAPP motion. " '[T]he moving defendant's burden is to show the challenged cause of action 'arises' from protected activity. [Citations.] Once [but only if] it is demonstrated the cause of action *arises* from the exercise of the defendant's free expression or petition rights, then the burden shifts to the plaintiff to show a probability of prevailing in the litigation.' [Citation.]" (*Moore v. Shaw, supra*, 116 Cal.App.4th at p. 194.)

Here, in opposing Miranda's anti-SLAPP motion below, the District conceded "Miranda's comments . . . arose from acts in furtherance of his rights of free speech and petition." The District makes the same concession on appeal. Its respondent's brief states: "[T]he first prong of the anti-SLAPP analysis is not at issue since the District acknowledges that its lawsuit targets speech, albeit defamatory speech."

Thus, it was undisputed that Miranda's moving papers on the anti-SLAPP motion met their burden. Therefore, the District's opposition papers on the anti-SLAPP motion focused purely on the merits of the action. In those opposition papers, the District contended the anti-SLAPP motion should be denied because there was a reasonable probability it would prevail on its various causes of action against Miranda, that is to say, it had established a *prima facie* showing of facts to sustain a judgment in its favor if its evidence were credited.

Given these circumstances, irrespective of the unauthorized moving declaration, the moving papers on the anti-SLAPP motion met their burden and successfully shifted the burden to the District to present evidence to show a reasonable probability it could prevail in the action. Therefore, the anti-SLAPP motion was not frivolous. Accordingly, the order sanctioning Castillo for filing the anti-SLAPP motion must be reversed with directions to deny the District's motion for sanctions under section 425.16, subdivision (c).

*4. Merely because the District is not entitled to sanctions under section 425.16, subdivision (c) does not mean that Castillo's conduct in filing an unauthorized declaration is not sanctionable.*

Our reversal of the order sanctioning Castillo under section 425.16, subdivision (c) should not be construed as an exoneration of Castillo.

The trial court found Castillo signed the moving declaration on the anti-SLAPP motion without authorization by Miranda. As discussed, the record supports that finding. The issue remains whether said conduct by Castillo warrants the imposition of sanctions pursuant to some authority other than section 425.16.

Therefore, our reversal of the sanctions imposed pursuant to section 425.16, subdivision (c) is without prejudice to the trial court's entertaining a new motion for sanctions, either on its own motion or on the motion of the District. We express no opinion as to the merits of such a motion. We simply hold the trial court is vested with jurisdiction to consider the matter.

### **DISPOSITION**

The sanctions order is reversed with directions to deny the District's motion for sanctions under section 425.16, subdivision (c). The matter is remanded for further proceedings not inconsistent with this opinion. The District's request for sanctions on appeal is denied. The parties shall bear their respective costs on appeal.

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KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.